

1. Did claimant make a timely written claim for an accident on January 27, 1998?

2. Did claimant meet with personal injury by accident arising out of and in the course of employment through a series of microtraumas culminating in disability on September 11, 1998?
3. Did claimant give notice for the series of accidents within 10 days as required by K.S.A. 44-520? If notice was not given within 10 days, was there just cause for the delay? If there was just cause for the delay, did respondent have notice within 75 days?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Order should, for reasons different than those expressed by the ALJ, be affirmed.

For an appeal from a preliminary hearing order, the Board's jurisdiction is limited. The Board may review only allegations that the ALJ exceeded his/her jurisdiction. K.S.A. 1998 Supp. 44-551. This review includes authority to review the "jurisdictional" issues identified in K.S.A. 1998 Supp. 44-534a.

The Board concludes the Order respondent appeals in this case did not exceed the ALJ's jurisdiction. First, the Board agrees that the evidence supports the allegation that claimant experienced a series of injuries through the last day worked. This conclusion is supported by claimant's descriptions of the work he did and his consistent testimony that the condition gradually worsened. The medical evidence also supports this conclusion. Dr. David J. Clymer states that the vigorous lifting claimant did after the original injury may have aggravated his injury. Dr. Edward J. Prostic states that repetitious trauma caused worsening of the condition. Even though Dr. Prostic addresses only worsening through May 20, claimant continued to do the same job after that date. The Board concludes the evidence establishes by a preponderance of the credible evidence that claimant met with personal injury by a series of microtraumas through the last date worked, September 11, 1998.

Second, the Board concludes claimant gave timely notice of the series accident. Respondent acknowledges notice of the January 27, 1998, accident. Claimant testified that after the accident and before he sought medical treatment in May 1998, he advised his employer that the condition was deteriorating. At the same time, he discussed the possibility of moving to lighter work. The Board concludes the information claimant gave respondent should, in context with the circumstances, be notice sufficient to satisfy the statutory requirements. Obviously the notice was given before what may be treated as the date of accident, the last date worked. But in a case involving a series, the date of accident is in effect a fiction used to fix the date benefits begin and assign responsibility. The fiction serves a function but should not be confused with the reality that the injury occurs over a

period of time. Notice during the period the injury is occurring should be early enough to satisfy the notice requirements.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Bryce D. Benedict on February 17, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Anton C. Andersen, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director